IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10595 & 10598 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT WATER SUPPLY & SEWERAGE BOARD

Versus

KYA AND ABAN

Appearance:
Mr.J.R.Nanavaty with MR MH RATHOD for Petitioner
Mr.S.B.Vakil with MR KG SUKHWANI for Respondent No.1

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 12/10/2000

ORAL(COMMON) JUDGEMENT

Rule. Mr.K.G.Sukhwani with Mr.S.B.Vakil waives service of rule. With the consent of learned counsel for parties both the petitions have been heard together and are being disposed of by this common judgment.

2. In these petitions under Article 226 of the Constitution, the Gujarat Water Supply & Sewerage Board has challenged the orders dated 18.8.2000 and 1.9.2000

(at annexure "A" to the petition) passed by the learned Chief Justice of this Court in Petition Nos 51 and 52 of 1999 under Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act") by which the learned Chief Justice overruled the preliminary objection raised on behalf of the petitioner-Gujarat Water Supply & Sewerage Board (hereinafter referred to as "the Board") and has appointed two arbitrators, one of them being a retired Judge of this Court and the other being the retired Special Secretary and Chief Engineer, Arbitration Wing.

3. The facts leading to filing of these petitions briefly stated are as under:

(i) The State Government had taken a policy decision to provide water for Saurashtra Region and entrusted the said work to the Gujarat Construction Corporation Ltd (hereinafter referred to as "the Corporation") and M/s Koya and Aban (hereinafter referred to as "Koya & Co.") (respondent No.1 herein) entered into an agreement dated 16/1/1995 for the work of Narmada Pipe Line Project for providing 250 MLD drinking water by laying 245 Kms Twin Prestressed concrete pipe line for Saurashtra and Kachchh region including work of manufacturing, providing, laying jointing and commissioning the pipe line and related constructed work including installation of electrical and mechanical equipments. Article 22.2 of the said agreement, more particularly article 22.1 in so far it is relevant for the purpose of this petition reads under:

"22.2. Arbitration:

All disputes or differences in respect of which the decision of the Excecutive Engineer is not final and conclusive shall on the initiative of either party be referred to the adjudication of Sole Arbitrator to be appointed by Chief Secretary to Govt.of Gujarat.

The arbitration shall be conducted in accordance with the rules and procedures for arbitration under Indian Arbitration Act, 1940 with any statutory modifications thereof in the case of local contractors and shall be held in either case at such place and time in India as the Sole Arbitrator may determine. The decision of the Sole Arbitrator shall be final and binding upon the parties and the expenses of Arbitrator shall be paid as may be determined by the

Arbitrator".

(ii) The said work, however, not executed by the Construction Corporation or Koya & Co for reasons which are not connected with the subject matter of this petition. Thereafter, the State Govt.decided to entrust the said work to Gujarat State Water Supply & Sewerage Board, the petitioner herein (the Board), by a tripartite Memorandum of Understanding amongst the Construction Corporation, the Board and Koya & Co. The work was taken over by the petitioner-Board and was agreed to be executed by Koya & Co as the agency executing the work. Relevant clauses of the said MOU provided as under:

NOW THIS MEMORANDUM UNDERSTANDING RECORDS THAT:

1. That the agreement dated 16.1.1995 executed between GSCCL and Koya & Co in respect of Tender No. 34 and 5 for Narmada Pipeline Project as mentioned in detail in Schedule "A" hereto is revived subject to the conditions that a regular agreement shall be executed between GWSSB and Koya & Co on the terms and conditions contained hereunder:

2. All terms and conditions of the said agreement dated 16.1.1995 entered into between GSCCL and Koya & Co shall form part of the revived agreement to be entered into between GWSSB and Koya & Co subject to modifications/agreements appearing hereinafter and for all purposes the said agreement dated 16.1.1995 will form part of the revised agreement except any contrary or inconsistent provisions as are incorporated in this Memorandum of Understanding or revived agreement and in such case provisions of this MOU or revived agreement to be executed between GWSSB and Koya & Co shall prevail.

22. All other conditions of contract specifications, stipulations, addendum, amendments, securities, guarantees, performance bonds etc as by and between the GSCCL and the Koya & Co while signing the original contracts shall apply as they were to the contracts now entered into except for the additional clauses mentioned in the Memorandum of Understanding. The requisite bank guarantees, securities etc shall be executed afresh in favour of GWSSB.

25. Unless and until a regular agreement reviving the agreement dated 16.1.1995 in terms of this Memorandum of Understanding is executed within a period of two months from the date hereof, no rights intended to be created under these presents shall come into existence and neither party shall be entitled to any rights or privileges under these presents.

26. Any disputes arising out of this agreement shall be referred to arbitration, under the arbitration and conciliation act, 1996 and a retired Judge of the High Court and a person having technical knowledge of the nature of works to be undertaken in the present project, shall be, by mutual consent of parties, be appointed as Arbitrators. The venue of Arbitration shall be Gandhinagar only.

(iv) As contemplated by the aforesaid MOU, agreement was entered into between the petitioner Board and Koya & Co on 16.12.1997(in Special Civil Application No. 10595/2000) and on 6.1.1998 (in Special Civil Application No.10598/2000). Relevant clauses of the said agreement provided as under:

"4.That on approval of the Govt.of Gujarat under letter dated 19.11.1997 a Memorandum of Understanding (MOU) has been signed by the GSCCL, the GWSSB and the Koya Aban & Co on 21.11.1997. The said MOU has been made a part and parcel of this contract agreement.

10.That all earlier contract documents, correspondences, which were part of the original contract dated 16.1.1995 the owner viz Gujarat State Construction Corporation Ltd (GSCCL) shall stand replaced by Gujarat Water Supply and Sewerage Board (GWSSB). All terms and conditions, specifications etc contained in the original contract 16.1.1995 with GSCCL and the general conditions of contract contained in vol.II and technical specifications contained in vol.III, IV and vol.VI shall apply and form part of the new contract along with the additioanl clauses contained in MOU dated 21.11.1997 and the flow sheet and the alignment plan prescribing the scope of work under Annexure II and II of the MOU.

11. Now, therefore, in consideration of the mutual covenants and agreements of the parties herein contained and be performed, Koya Aban and Company hereby agrees to complete the works at the prices and on the terms and conditions herein contained, and the GWSSB hereby employs Koya Aban and Company and agrees to pay the contract prices provided herein for the fulfilment of the works and the purpose of covenants set forth herein. The further terms and conditions and covenants of the contract are set forth in the following parts each of which is attached hereto and by this reference made a part thereof.

a) Memorandum of Understanding signed and executed on 21.11.1997.

b) ... ...

c) The conditions of contract contained in volume II of the original contract dated 16.1.1995 with GSCCL.

d) ... ...

e) ... ...

f) ... ...

g) The amendments and addendums contained in Vol.VI of the original contract dt.16.1.1995 with GSCCL.

h) ... ...

i) ... ...

(v) On disputes having arisen between Koya & Co and the petitioner Board the Koya & Company sent a notice dated 26.7.1999 under clause 26 of the MOU dated 27.11.1997 calling upon the Board to appoint Arbitration Panel. On behalf of Koya & Co names of two retired Judges and two retired Chief Engineers were suggested. The petitioner did not comply with the said notice and, therefore, Koya & Co filed Petition under Arbitration Act Nos 51 and 52 of 1999 before the learned Chief Justice for appointment of arbitrators as per Cl.26 of the MOU.

(vi) The petitions came to be resisted by the Board mainly on the ground that the only arbitration clause was

Article 22.2 of the agreement dated 16.1.1995 as incorporated in the agreements dated 16.12.1997 and 6.1.1998 and as per said clause, Sole Arbitrator could be appointed by the Chief Secretary. It is contended that the MOU dated 21.11.1997 had come to an end upon execution of agreement dated 16.12.1997 and in any case clause 26 of the MOU did not survive upon execution of agreements dated 16.12.1997 and 6.1.1998 which contained the terms and conditions of the original agreement dated 16.1.1995 including Article 22.2.

(vii) After considering rival contentions, the learned Chief Justice has passed the impugned order 18.8.2000 overruling the preliminary objections raised on behalf of the petitioner Board. Hence the present petition is filed.

4. Mr.J.R.Nanavaty, Learned counsel for the petitioner Board has submitted that Clause 26 of the MOU provided for arbitration in respect of disputes arising out of "this agreement", i.e. " disputes arising out of MOU". Since the disputes raised in the arbitration petitions are raised under agreements dated 16.12.1997 and 6.1.1998, essentially clause 26 of the MOU cold not be invoked. It is further submitted that since the agreement dated 16.12.1997 and 6.1.1998 specifically provides for continuation of terms and conditions of original agreement dated 16.1.1995 (except those which are modified by the subsequent agreement dated 16.12.1997) Article 22.2 of the agreement dated 16.1.1995 still survives and that is the only arbitration clause in the contract between the parties. It is submitted that the learned Chief Justice has erred in holding that in case of any inconsistency between the two arbitration clauses the later one in the MOU will prevail. It is submitted that question of inconsistency will arise only if the MOU was held to be operative or clause 26 of the MOU was held to be operative. The MOU must be held to have come to an end upon execution of the agreement dated 16.12.1997 there was no arbitration clause other than Article 22.2 of the agreement dated 16.1.1995, and therefore, the impugned order deserves to be set aside.

5. On the other hand, Mr.S.B.Vakil, learned counsel appearing on caveat for the respondent No.1-Koya & Co has supported the order passed by the learned Chief Justice and has invited the attention of this Court to and relied upon the clauses which are already set out hereinabove.

Mr.Vakil has further relied on the decision of

the Apex Court in Income Tax Appellate Tribunal, Hyderabad Special Bench, Hyderabad vs Deputy Commissioner of Income Tax, Hyderabad in AIR 1996 SC 1066 for submitting that this Court would not interfere with the administrative orders passed by the learned Chief Justice even if the other views were possible as the object of the Arbitration Act, 1996 is that the arbitrator should resolve the dispute as expeditiously as possible and that there should be minimum intervention of court of law so that trade and commerce does not suffer on account of litigation before the Court.

6. Having heard the learned counsel for the parties, it appears to this Court that as provided in Clause 2 of the MOU dated 21.11.1997 and clauses 10 and 11 of the agreement dated 16.12.1997 the terms and conditions in the MOU have been incorporated by reference in the agreement dated 16.12.1997 and 6.1.1998. The contention of Mr.Nanavaty that the MOU ceased to be operative upon expiry of the period of two months can not be accepted for the simple reason that clause 25 of the MOU provided that no rights under the MOU shall come into existence unless and until a regular agreement reviving agreement dated 16.1.1995 in terms of Memorandum of Understanding was executed within a period of two months from the date of the MOU. If the MOU had not been followed by a regular agreement incorporating the terms of the agreement dated 16.1.1995, the MOU would have come to an end upon expiry of two months from 21.11.97, but once subsequent agreement came to be executed on 16.12.1997 in terms of MOU reviving agreement dated 16.1.1995 the MOU including clause 26 thereof came to be incorporated in the subsequent agreements dated 16.12.1997 and 6.1.1998.

7. Obviously, there is inconsistency between articles 22.2 of the agreement dated 16.1.1995 and clause 26 of the MOU dated 21.11.1997. In the first place, Article 22.2 confers the powers of appointment of Sole arbitrator as the Chief Secretary of the State Govt. Clause 26 of the MOU dated 21.11.1997 provides for appointment of a retired Judge of the High Court and a technical member as arbitrators. The said clause further makes a specific reference to the provisions of Arbitration & Conciliation Act, 1996 while Article 22.2 of the agreement dated 16.1.1995 made reference to the provisions of Arbitration Act 1940 which was the law then applicable.

8. Having perused the relevant clauses of the agreement dated 16.1.1995 and the MOU dated 21.11.1997 and subsequent agreement dated 16.12.1997 and 6.1.1998

and more particularly those which are already set out hereinabove, it appears that the view taken in the impugned order dated 18.8.2000 is the only plausible view. Even if the other view was possible, in view of the limited scope of powers for judicial review under Article 226 of the Constitution, this Court finds no scope for interference with the impugned orders dated 18.8.2000 and 1.9.2000.

9. In view of the above discussion, these petitions are dismissed. Rule in each petition is discharged.

12.10.2000 (M.S.SHAH,J)